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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that analytical reports about the safety of nuclear power plants, distributed widely throughout the nuclear industry and submitted to the Nuclear Regulatory Commission by an industry consortium, may be withheld from the public under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential"?

PARTIES TO THE CASE

All parties to the case appear in the caption. The Business Roundtable, an association of chief executive officers of corporations, filed a brief as *amicus curiae* on rehearing *en banc* supporting respondents. Petitioner Critical Mass Energy Project is an unincorporated division of Public Citizen, Inc., a non-profit District of Columbia corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE CASE ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT STATUTE 2

STATEMENT OF THE CASE 2

1. The FOIA Request 2
2. First District Court and Appellate Proceedings 5
3. Remand and Second Appeal 6
4. Proceedings *En Banc* 8

REASONS FOR GRANTING THE WRIT:

The Decision Below Raises Important Questions of Interpretation of the Freedom of Information Act That Should be Settled by This Court, It Conflicts With Other Appellate Decisions, and It Creates Serious Problems in the Adminstration of the Act 12

1. The Ill-Defined Nature of the Voluntary/Mandatory Distinction 14
2. The Incentive for Agencies To Evade the FOIA by Accepting Information Voluntarily . 19
3. The Deviation From the Purpose of Exemption 4 22
4. The Reverse-FOIA Problem 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Page**

Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) 13, 25

Administrator, FAA v. Robertson, 422 U.S. 255 (1975) 21

American Airlines v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978) 13

American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978) 21

Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990) ... 13

Bowen v. FDA, 925 F.2d 1225 (9th Cir. 1991) 19

CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987) 24

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 17, 23

Common Cause v. Department of Air Force, 1 GDS ¶ 80,162 (D.D.C. 1980) 22

Comstock International (U.S.A.) v. Export-Import Bank of the United States, 464 F. Supp. 804 (D.D.C. 1979) 17, 18

Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) 13

Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373 (2d Cir. 1977) 13

Critical Mass Energy Project v. NRC, 644 F. Supp. 244 (D.D.C. 1986), *vacated and remanded*, 830 F.2d 278 (D.C. Cir. 1987), *on remand*, 731 F. Supp. 554 (D.D.C. 1990), *rev'd and remanded*, 931 F.2d 939 (D.C. Cir. 1991), *vacated for rehearing en banc*, 942 F.2d 799 (D.C. Cir. 1991), *on rehearing en banc*, 975 F.2d 871 (D.C. Cir. 1992) ..... 1, *passim*

Department of Air Force v. Rose, 425 U.S. 352 (1976) 19, 21

Department of Justice v. Julian, 476 U.S. 1 (1988) 19

General Elecric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984) 13, 14, 24

Green v. Department of Commerce, 468 F. Supp. 691 (D.D.C. 1979) 22

Indian Law Resource Center v. Department of Interior, 477 F. Supp. 144 (D.D.C. 1979) 17, 19

McDonnell Douglas Corp. v. Rice, No. 92-2211-JHG (D.D.C.) (Sept. 30, 1992) 17, 24, 25

Miami Herald Publishing Co. v. Small Business Administration, 670 F.2d 610 (5th Cir. Unit B 1982) 17

National Organization for Women v. Social Security Administration, 736 F.2d 727 (D.C. Cir. 1984) 24

National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) ..... 4, *passim*

9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1 (1st Cir. 1983) 13, 14, 18, 22

Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980) 13

Pacific Architects & Engineers v. Department of State, 906 F.2d 1345 (9th Cir. 1990) 13, 25

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 9

Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983) 5, 22, 23

Sharyland Water Supply Corp. v. Block, 755 F.2d 397 (5th Cir.), *cert. denied*, 421 U.S. 1137 (1985) 13

Shermco Industries v. Secretary of Air Force, 613 F.2d 1314 (5th Cir. 1980) 13

Teich v. FDA, 751 F. Supp. 243 (D.D.C. 1990) 15, 18, 22

Timken Co. v. United States Customs Service, 531 F. Supp. 194 (D.D.C. 1981) 19

Washington Post Co. v. HHS, 690 F.2d 252 (D.C. Cir. 1982) 19

Washington Post Co. v. HHS, 865 F.2d 320 (D.C. Cir. 1989) 15

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) 13

Statutes and Legislative Materials:

5 U.S.C. § 552(b)(4) ..... 1, *passim*

5 U.S.C. § 552b(c)(4) 10, 13

5 U.S.C. App. § 10 13

5 U.S.C. § 706(2)(a) 17

7 U.S.C. § 136a(c) 15, 16

15 U.S.C. § 46(f) 13

15 U.S.C. § 1401 14

15 U.S.C. § 2055 13

15 U.S.C. § 2604 15

18 U.S.C. § 1905 17

21 U.S.C. § 355 15

28 U.S.C. § 1254(1) 2

122 Cong. Rec. 24,181 (1976) 13

H.R. Rep. No. 880, pt. I,
94th Cong., 2d Sess. (1976) 13, 21

H.R. Conf. Rep. No. 917, 96th Cong.,
2d Sess. (1980) 13

H.R. Conf. Rep. No. 208, 97th Cong.,
1st Sess. (1981) 13

S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. (1976) 13

S. Rep. No. 500, 96th Cong., 1st Sess. (1979) 13

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 20

Regulations:

10 C.F.R. § 50.73 4

21 C.F.R. § 314.60 16

21 C.F.R. § 314.102 16

40 C.F.R. § 716.40 15

40 C.F.R. § 152.105 16

41 C.F.R. § 60-1.7 17

48 C.F.R. 5.401(b) 25

48 C.F.R. 14.408-1 25

48 C.F.R. 15.610 16

48 C.F.R. 205.303 25

45 Fed. Reg. 6793 (1980) 20

46 Fed. Reg. 3541 (1981) 20

46 Fed. Reg. 49,134 (1981) 20

48 Fed. Reg. 33,850 (1983) 4

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No. 92-

CRITICAL MASS ENERGY PROJECT,

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NUCLEAR REGULATORY COMMISSION and INSTITUTE OF NUCLEAR POWER OPERATIONS,

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PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The first opinion of the District Court, granting summary judgment for the Nuclear Regulatory Commission, is reported at 644 F. Supp. 344 (D.D.C. 1986) and appears in the appendix to this petition ("Pet. App.") at 36a-41a. The first opinion of the Court of Appeals, vacating and remanding for further proceedings, is reported at 830 F.2d 278 (D.C. Cir. 1987) and appears at Pet. App. 42a-64a. The opinion of the District Court on remand, granting summary judgment for respondents, is reported at 731 F. Supp. 554 (D.D.C. 1990) and appears at Pet. App. 66a-72a. The second opinion of the Court of Appeals, reversing and remanding, is reported at 931 F.2d 939 (D.C. Cir. 1991) and appears at Pet. App. 73a-90a. The order of the Court of Appeals vacating the panel opinion and granting rehearing *en banc* is reported at 942

F.2d 799 (D.C. Cir. 1991) and appears at Pet. App. 91a-92a. The opinion of the *en banc* Court of Appeals affirming the District Court, which is the subject of this petition, is reported at 975 F.2d 871 (D.C. Cir. 1992) and appears at Pet. App. 1a-33a.

JURISDICTION

The judgment of the Court of Appeals on rehearing *en banc* was entered on August 21, 1992. On October 7, 1992, the Chief Justice entered an order extending the time to file a petition for a writ of *certiorari* to and including December 19, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTE

Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), provides that the FOIA does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

STATEMENT OF THE CASE

1. *The FOIA Request.* This case arises out of petitioner's FOIA request for a series of reports about the safety of nuclear power plants submitted to respondent Nuclear Regulatory Commission ("NRC") by respondent Institute of Nuclear Power Operations ("INPO"). Petitioner is a non-profit research and advocacy group concerned with nuclear power issues. INPO is a non-profit organization created by the nuclear power industry after the 1979 incident at the Three Mile Island plant. All the utility companies that operate nuclear plants in this country are members of INPO. INPO does not generate nuclear power itself, nor does it have competitors. INPO's stated mission is to promote the safety and reliability of nuclear plants, which it does by analyzing operating

experiences at nuclear plants and disseminating information to its members.

After Three Mile Island, the NRC developed an "Action Plan" which required nuclear utilities to make sure that their personnel were made aware of new information about the safety of nuclear power on a regular basis. Because it would be prohibitively expensive for every nuclear plant to develop its own procedures for monitoring all safety information in the industry, INPO established a clearinghouse to perform that function, known as the Significant Event Evaluation and Information Network ("SEE-IN"). Under SEE-IN, INPO engineers analyze safety-related "events" at nuclear plants, using a broad range of sources, including technical literature, publicly available NRC records, and interviews with plant employees. INPO engineers then summarize their analyses and make recommendations for corrective actions in SEE-IN reports, which are the records at issue in this case.

INPO distributes the SEE-IN reports to all operators of nuclear power plants in this country, and also to engineering and construction firms, to an insurer for the industry, and to consultants and contractors. This wide distribution is central to the SEE-IN program, which is intended to inform employees in the nuclear industry of safety experiences at every nuclear plant, and thus to satisfy the requirements of the NRC's Three Mile Island Action Plan. In 1982, the NRC endorsed SEE-IN as a way for nuclear licensees to satisfy their obligations under the Action Plan.

The NRC also entered into an agreement with INPO, under which INPO agreed to provide the SEE-IN reports to the NRC, and the NRC agreed not to release the SEE-IN reports to the public. The NRC uses the SEE-IN reports to make sure that licensees are in fact making their employees aware of new safety information, as

required by the Action Plan. The NRC also uses the SEE-IN reports to check the completeness and accuracy of other, similar reports that nuclear licensees are required to submit to the NRC within thirty days of any safety-related event, known as Licensee Event Reports ("LERs"). LERs are supposed to give the NRC a full understanding of the underlying causes of safety events, and also to explain corrective actions planned by the licensee. *See generally* 10 C.F.R. § 50.73; 48 Fed. Reg. 33,850 (1983). The NRC routinely discloses LERs to the public.

In 1984, petitioner submitted a FOIA request to the NRC for the SEE-IN reports. The NRC withheld the reports under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The NRC did not argue that the reports contained trade secrets or privileged information, but maintained that they contained "commercial . . . confidential" information, even though the reports include no competitively sensitive sales or marketing data and are shared with everyone in the nuclear industry.

Under the test then governing Exemption 4, information could be withheld as "confidential" only upon a showing that "disclosure of the information is likely . . . to impair the Government's ability to obtain necessary information in the future; or . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The NRC did not argue that disclosure would cause competitive harm to either INPO or its members, but rather that the SEE-IN reports were exempt under the governmental "impairment" prong of the *National Parks* test. According to the NRC, INPO had

threatened to withhold the reports from the NRC in the future if the NRC released them, and even if the NRC could obtain the reports, the possibility of disclosure might impair the quality of those reports in the future.

2. *First District Court and Appellate Proceedings.* Petitioner filed suit against the NRC, and both parties moved for summary judgment. Petitioner argued that, even if INPO refused to provide the reports to the NRC in the future, that could not impair the NRC's ability to obtain the reports, because INPO would continue to provide the reports to its licensee members, and the NRC had ample power to obtain the reports directly from the licensees. The District Court acknowledged petitioner's argument but concluded that disclosure of the reports would impair the NRC's ability to obtain them in the future, because the reports were currently provided "voluntarily" to the NRC by INPO. Pet. App. 40a.[1]

The Court of Appeals vacated and remanded. Pet. App. 42a-64a. The Court rejected the District Court's conclusion that the voluntary character of the submission, by itself, could determine whether the reports were exempt from disclosure. According to the Court of Appeals, a rule of decision resting solely on the voluntary-involuntary distinction would be inconsistent with the requirement established in the case law of Exemption 4, including *National Parks*, that an agency must provide a "detailed justification" of the reason why disclosure would impair its

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[1] Petitioner also argued that the SEE-IN reports did not contain "commercial" information because INPO was a not-for-profit entity, and because the information bore no relation to sales, purchases, or exchanges of goods or services. The District Court rejected this argument, relying on Circuit precedent. Pet. App. 38a (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). The Court of Appeals affirmed this conclusion in the first panel opinion, Pet. App. 47a, and on rehearing *en banc*, Pet. App. 19a.

ability to obtain the information in the future. Pet. App. 52a. In particular, the Court observed that, under its prior decisions, the agency's ability to compel disclosure of information that it receives voluntarily may be sufficient to ensure that its access to the information would not be impaired in the future. Pet. App. 53a, n. 26. Indeed, as the Court noted, the NRC admitted that it would be able to obtain the reports by requiring their submission directly from the licensees. Pet. App. 52a.

However, the Court of Appeals found plausible the NRC's argument that, even if it could obtain the reports by compulsory means, the usefulness of the reports might decline, because nuclear plant employees, knowing the reports would be disclosed, might be less candid in their discussions with INPO analysts about the possible causes of events at their plants. Pet. App. 56a-57a. Because there was no evidence in the record that the quality of the SEE-IN reports would decline as a result of disclosure, the Court remanded for further proceedings on that issue. The Court also ruled that the NRC could prevail if it showed that disclosure would impair the efficiency of its operations, for example, if the process of compelling submission of the SEE-IN reports directly from the licensees would be too burdensome. Pet. App. 59a-61a.

Circuit Judge Buckley dissented from the remand, and would have ruled that the SEE-IN reports were exempt from disclosure solely because they were submitted to the NRC voluntarily. He concluded that Exemption 4 was intended to encourage cooperation by parties who are not to obliged to provide information to the Government, and that the "impairment" prong of the *National Parks* test should be deemed satisfied whenever disclosure would interfere with the agency's ability to obtain information on a voluntary basis. Pet. App. 62a-63a.

3. *Remand and Second Appeal.* On remand, INPO intervened as a defendant, and all parties moved for

summary judgment. The NRC and INPO argued principally that nuclear plant employees would no longer be forthright with INPO analysts if they knew that the SEE-IN reports would be disclosed to the public, and this lack of candor would impair the quality of those analysts' reports and their usefulness to the NRC. At oral argument, the District Court characterized the respondents' affidavits as conclusory on this point, and suggested that respondents should submit evidence that INPO analysts give express or implied promises of confidentiality to nuclear plant employees, or that employees rely on the limited disclosure of the reports.

Respondents never submitted this evidence. Nevertheless, the District Court again granted summary judgment, under the separate theory that the NRC's efficiency of operations would be impaired by disclosure. The District Court reasoned that disclosure might damage the friendly "symbiosis in the relationship between NRC and INPO" and would make the NRC and INPO "[i]f not outright antagonists, . . . at best . . . wary allies." Pet. App. 72a.

The Court of Appeals again reversed and remanded because of the lack of evidence supporting respondents' impairment argument. Pet. App. 73a-90a. The panel first rejected the District Court's reasoning that the disruption of the friendly relationship between the NRC and INPO warranted an exemption on the theory that acrimony would impair the NRC's efficiency of operations. The panel noted that, if that theory were correct, a submitter could essentially dictate whether information was confidential for purposes of the FOIA by threatening non-cooperation in the future, which would conflict with the accepted principle that " 'the test for confidentiality is an objective one.' " Pet. App. 83a (quoting *National Parks*, 498 F.2d at 766).

As for the argument that disclosure would inhibit nuclear plant employees from speaking candidly with INPO analysts, the panel found nothing in the record to support such a finding. In particular, the panel noted the complete absence of any evidence that INPO analysts give promises of confidentiality to plant employees. The panel also found no evidence that the SEE-IN reports could reveal the identity of any nuclear plant employees if the reports were released to the public, as the reports do not identify the sources of information on which they are based. Pet. App. 86a-87a & n. 8.

In a concurring opinion, Judge Randolph, joined by Judge Williams, agreed that the record could not support the District Court's grant of summary judgment under the "impairment" prong of the *National Parks* test, but expressed doubt that *National Parks* had been correctly decided. Pet. App. 89a-90a. Judge Randolph stated that, if the matter were one of first impression, he would reject the *National Parks* test and would conclude that information was "confidential," and therefore exempt from disclosure, as long as it was not "publicly disseminated," whether or not disclosure would cause any identifiable harm to the Government or to the submitter of the information. Judge Randolph observed, however, that the D.C. Circuit had endorsed *National Parks* many times, even in a prior decision in the same case, and that he was barred by both the law of the circuit and the law of the case from following either what he considered to be the plain language of the statute or Judge Buckley's dissent in the prior decision.

4. *Proceedings En Banc*. Respondents filed petitions for rehearing and suggestions for rehearing *en banc*, urging the Court of Appeals to overrule *National Parks* and to adopt a broader construction of Exemption 4. Respondents argued that information should be exempt from disclosure as "confidential" whenever it would not

"customarily" be disclosed to the public, whether or not disclosure would cause any identifiable harm to the Government or the submitter. Neither respondent suggested that the Court of Appeals should adopt the construction proposed in Judge Buckley's earlier dissent, *viz.*, that information is confidential if it is submitted voluntarily to the Government.

The Court of Appeals vacated the panel decision and granted rehearing *en banc* to reconsider *National Parks*.[2] Pet. App. 91a. In their *en banc* briefs, both respondents argued again that the Court should overrule *National Parks* and hold that information is always confidential if it is not customarily disclosed to the public by the submitter. Again, neither respondent argued in favor of the position taken in Judge Buckley's dissenting opinion on the first appeal.

On rehearing, a divided *en banc* Court, per Judge Buckley, affirmed the District Court. Pet. App. 1a-20a. The Court first rejected respondents' suggestion that *National Parks* be entirely overruled. Applying the principles of *stare decisis* outlined by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court concluded that respondents had failed to demonstrate any of the considerations that could justify overturning *National Parks*. Observing that seven other Circuits had adopted the *National Parks* test for Exemption 4 cases, the Court of Appeals concluded that "[f]ar from being overtaken by the tide of recent judicial developments, *National Parks*, it seems, has ridden its crest." Pet. App. 12a. The Court also noted that Congress had adopted the *National Parks* test when it enacted a similar business-records exemption to the

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[2] Then-Circuit Judge Thomas participated in the decision to grant rehearing *en banc* but was elevated to this Court before oral argument.

Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), which is closely related to the FOIA. Pet. App. 12a. The Court further rejected respondents' contention that *National Parks* had proven unworkable in application, and it dismissed cases cited by the respondents as merely illustrating difficulties that arise "wherever judicial lines are drawn." Pet. App. 13a.

Nevertheless, the Court dramatically "confined" the *National Parks* test by limiting its application to information that submitters are *required* to give to the Government. Pet. App. 2a, 13a-20a. For information that submitters supply "voluntarily" to the Government but do not "customarily" disclose to the public, the Court adopted a new categorical rule that all such information is "confidential," and therefore exempt from disclosure under Exemption 4, whether or not its disclosure would cause any demonstrable harm to either the Government or the submitter. Indeed, the Court observed that, in such cases, the courts should respect the private interest in withholding information from the public "for whatever reason." Pet. App. 16a.

The Court did not, however, provide any guidance as to when information should be deemed to have been provided "voluntarily" to the Government, except to conclude that the test for voluntariness was met in this case because submission of the SEE-IN reports had not been legally compelled, even though the NRC had the statutory authority to compel the licensees to submit the reports, should it wish to exercise that authority. The Court also rejected petitioner's argument that a categorical rule exempting voluntary submissions would encourage agency behavior in conflict with the FOIA's mandate for disclosure, by allowing agencies to agree to accept information on a "voluntary" basis on condition that it be withheld from the public, even when the agencies could,

and would, compel submission of the information without difficulty. Pet. App. 19a.

For information that is required to be submitted, the Court also reformulated the "impairment" prong of its prior test. Although the Court recognized that the Government's access to information cannot be impaired if production of the information is compelled, it speculated that, in some circumstances, disclosure could affect the reliability of the compelled data. Therefore, the Court ruled that, when dealing with a FOIA request for information that a submitter is required to provide, the impairment inquiry should focus on the possible effect of disclosure on the quality of the information. Pet. App. 15a-16a.

Judge Randolph, joined by Judges Silberman and Sentelle, filed a concurring opinion, in which they concluded that *National Parks* had been wrongly decided, but that respondents had not made the showing necessary to overrule it, given its near-universal adoption in the other Circuits. Pet. App. 23a. They also concluded that, although *National Parks* should not be overruled, it should not be applied to cases involving information submitted voluntarily to the Government. *See* Pet. App. 23a-24a.

Judge Ruth Ginsburg, joined by Chief Judge Mikva and Judges Wald and Edwards, filed a dissenting opinion. Pet. App. 25a-33a. The dissent observed that, by removing all voluntary submissions from the *National Parks* test, the majority had "substantially revise[d]" the law of the Circuit and "diminishe[d] as well sister circuit case law patterned on [the] *National Parks* decision." Pet. App. 25a. The dissent pointed out that no other court had concluded that voluntarily submitted information was governed by a different test than *National Parks*, and that the First Circuit and District Courts in the D.C. Circuit had applied *National Parks* to information furnished to the Government voluntarily. Pet. App. 28a-29a.

The dissent also criticized the majority opinion as unfaithful to both *National Parks* and the Congress' "unmistakably clear direction" in favor of disclosure in the FOIA. Pet. App. 30a. After reviewing the *National Parks* decision, the dissent pointed out that the *National Parks* panel had concluded that the "impairment" prong was not applicable to information required to be submitted to the Government, and therefore, that panel must have intended the "impairment" prong to have "its principal utility in cases of information voluntarily submitted." Pet. App. 28a. The dissent also argued that the majority's new test was not objective, because it provides for no judicial check on the reasonableness of the submitter's claim that the information was confidential, and bears no relation to the Congress' particular purpose in enacting Exemption 4, the protection of competitively sensitive information. Pet. App. 26a-27a. According to the dissent, the majority's rule encourages agencies to follow the path of least resistance and accede to submitters' requests for confidentiality, in sharp conflict with the FOIA's mandate for disclosure. Pet. App. 30a-31a.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Important Questions of Interpretation of the Freedom of Information Act That Should be Settled by This Court, It Conflicts With Other Appellate Decisions, and It Creates Serious Problems in the Adminstration of the Act.

This Court has never construed Exemption 4 of the FOIA, but with impressive unanimity, all the Circuits that have done so before this case have adopted the *National*

Parks test first enunciated by the D.C. Circuit in 1974.[3] Congress has also embraced *National Parks* by adopting that test for at least four other statutes that incorporate, or are worded similarly to, Exemption 4 of the FOIA: the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), *see* 122 Cong. Rec. 24,181 (1976), S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. 15 (1976), H.R. Rep. No. 880, pt. I, 94th Cong., 2d Sess. 10 (1976); the Federal Advisory Committee Act, 5 U.S.C. App. § 10; the Federal Trade Commission Act, 15 U.S.C. § 46(f), *see* H.R. Conf. Rep. No. 917, 96th Cong., 2d Sess. 28 (1980), S. Rep. No. 500, 96th Cong., 1st Sess. 10-12 (1979); and the Consumer Product Safety Act, 15 U.S.C. § 2055(a)(2), *see* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 877 (1981). For eighteen years, *National Parks* has worked well in the agencies and the courts, and the Government has never sought *certiorari* to have it overruled.

The decision below destroys the uniformity of this settled construction of Exemption 4 and introduces an arbitrary and unworkable distinction between voluntary and mandatory submissions. This distinction was not

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[3] *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors*, 721 F.2d 1, 8 (1st Cir. 1983); *Orion Research, Inc. v. EPA*, 615 F.2d 551, 553 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980); *American Airlines v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1207 n.55 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 421 U.S. 1137 (1985); *Shermco Indus. v. Secretary of Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980); *Continental Oil Co. v. FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *General Elec. Co. v. NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984); *Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir. 1990).

advanced by any of the parties, has never been thought to be dispositive before, has never been mentioned in decisions of the other Courts of Appeals adopting or applying *National Parks*, and is contrary to the decision of the First Circuit in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1983). Moreover, the Court of Appeals' rule is fundamentally inconsistent with the FOIA's overarching goal of disclosing important information about the operations of the Government, unless one of Congress' objective criteria for withholding records is satisfied.

1. *The Ill-Defined Nature of the Voluntary/Mandatory Disctinction.* A major defect in the Court of Appeals' decision is that it draws an arbitrary line between mandatory and voluntary submissions of information to the Government, while providing no guidance for distinguishing between the two. The Court incorrectly assumed that all submissions could be neatly divided into two categories. Its rigid formulation does not reflect the reality of the many means by which governmental agencies obtain information; in fact, it is often unclear whether information obtained by the Government from private parties is submitted under compulsion or voluntarily. The agency may believe that regulated entities are legally required to provide certain information, but those entities may disagree.

Thus, in one common scenario, an agency sends a subpoena *duces tecum* to a company, which threatens to contest the subpoena on the grounds that it is overbroad and beyond the agency's statutory authority, but ultimately agrees to provide the information, on condition that the agency withdraw the subpoena. *See, e.g., General Electric Co. v. NRC*, 750 F.2d 1394, 1396 (7th Cir. 1984) (NRC subpoena during licensing proceeding); *see also* 15 U.S.C. § 1401(b),(c) (Secretary of Transportation may require

inspection and production of documents, but only reasonably, and as relevant to certain purposes). Even the agency's regulations may reflect ambivalence on whether submission of information is mandatory. For example, EPA regulations implementing the Toxic Substances Control Act state that "EPA may, by letter, request a person to submit" certain information, but that "[i]f the requested submissions are not made, EPA may subpoena them." 40 C.F.R. § 716.40. Whether information obtained in any of these circumstances is submitted "voluntarily" is far from clear, and courts hearing FOIA cases seeking such information will now routinely have to decide that issue.

The Court of Appeals' mandatory/voluntary distinction fails to provide any guidance in many circumstances. For example, the Government requires information to be submitted with many different kinds of applications, *e.g.*, for approval to place new drugs on the market, for permission to transport toxic substances and pesticides, for federal grant funding, for loan guarantees, and for procurement contracts. *E.g.*, 7 U.S.C. § 136a(c) (pesticides); 15 U.S.C. § 2604 (toxic substances); 21 U.S.C. § 355 (new drugs). Since nothing compels any person to submit any of these applications, or to construct a nuclear power plant, or to make a public offering of securities, or to seek federal employment, all information submitted on such occasions is provided "voluntarily," in one sense, even if regulations require submission of information whenever these benefits are sought. *See also Washington Post Co. v. HHS*, 865 F.2d 320 (D.C. Cir. 1989) (financial interest forms required of consultants to federal government); *Teich v. FDA*, 751 F. Supp. 243, 246 (D.D.C. 1990) (animal studies submitted to FDA in support of application for approval of injectable silicone). Moreover, applicants often provide information beyond that strictly required to increase the chances of their applications being granted, and the Government often asks applicants to submit information

to make their applications more complete. *See, e.g.*, 21 C.F.R. §§ 314.60, 314.102 (discussing amendments and supplementations to new drug applications submitted to FDA); 7 U.S.C. § 136a(c)(2), 40 C.F.R. § 152.105 (EPA may ask for more information on pesticide registration applications). Whether such additional information is being provided voluntarily within the meaning of the D.C. Circuit's new test is also unclear.

The Court of Appeals' rule may create the greatest confusion in the area of government contracts, especially negotiated contracts. Under the Federal Acquisition Regulations System ("FARS"), agencies procuring materials through negotiated contracts may specify requirements for initial offers in their solicitations for proposals. But by the very nature of negotiated contracts, offerors are likely to supplement their initial proposals with further information, and the FARS recognizes that offerors should have the opportunity to submit revised technical and price information. *See* 48 C.F.R. 15.610. Yet the Court of Appeals' decision provides no method for determining which information obtained in the contracting process is submitted voluntarily and which is not, and, more significantly, there may never be a predictable or realistic basis for making such a determination.

In this area, the effect of the decision below can already be seen. In a "reverse-FOIA" lawsuit filed by a Government contractor to enjoin the Government from disclosing information, one court has ordered the Air Force not to release option price information in a procurement contract.[4] The Court concluded that the

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[4] "Reverse-FOIA" suits are actions brought by companies who submit information to the Government to prevent the disclosure of that information by the Government. Reverse-FOIA suits usually allege that disclosure of the information would be "not in accordance

(continued...)

price information was exempt from disclosure under the D.C. Circuit's new test because the contractor had submitted the bid to the Air Force of its own volition, and thus the price information in the accepted contract was submitted voluntarily by the bidder. Transcript of Motions Hearing at 35, *McDonnell Douglas Corp. v. Rice*, No. 92-2211-JHG (D.D.C.) (hearing held Sept. 30, 1992, transcript filed Oct. 1, 1992).

Furthermore, any information that the Government requires its contractors to provide even after formation of a contract, as a condition of contracting, might also be considered "voluntary," under the reasoning that contracting with the Government is voluntary, and private parties could avoid the obligation by declining to do business with the Government. The Government obtains extensive reports on matters of significant public interest from its contractors, all of which could be withdrawn from the public. *See, e.g.*, 41 C.F.R. § 60-1.7 (equal employment opportunity reports required from all federal contractors); *Miami Herald Pub. Co. v. Small Business Admin.*, 670 F.2d 610 (5th Cir. Unit B 1982) (reports on federally guaranteed loans); *Indian Law Resource Ctr. v. Department of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979) (Indian tribe's law firm's billing statements required for disbursement of funds to tribe); *Comstock Int'l (U.S.A.) v. Export-Import Bank of the United States*, 464 F. Supp. 804, 809 (D.D.C. 1979) (progress reports for subsidized construction contract).

For these reasons, courts following *National Parks* eschewed a formalistic line between voluntary and mandatory submissions and applied a straightforward

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[4](...continued)
with law," 5 U.S.C. § 706(2)(a), because disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905, and is not required under the FOIA. *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

"impairment" test to all information obtained by the Government that was not competitively sensitive. Thus, in *9 to 5*, *supra*, the First Circuit ordered a remand under *National Parks* to determine whether any specific governmental interest protected by Exemption 4, including the Government's access to necessary information, would be impaired by disclosure of regional salary information which private businesses shared with the Federal Reserve Bank of Boston, and with each other. Although the submission of that information was plainly voluntary (there was no suggestion that the Federal Reserve Bank had the power to compel it), the Court apparently did not regard that point significant enough to mention. Yet if the First Circuit had applied the new test announced by the D.C. Circuit in the decision below, a remand would have been unnecessary because the voluntary nature of the submission would have been sufficient to make the information exempt from disclosure.

Previously, courts in the D.C. Circuit agreed that, even if information was obtained "voluntarily," that information might not be exempt from the FOIA if the agency could compel its submission. *See* Pet. App. 53a, 85a; *Teich*, *supra*, at 251 (ordering disclosure, because it was "inconceivable" that FDA could not, and would not, compel submission of evidence showing that silicone gel implants should be removed from market); *Comstock*, *supra*, at 809 (pointing out that agencies can always make reporting requirements more specific). Applying the "impairment" prong of *National Parks*, those courts reasoned that the Government's ability to obtain information would not be impaired if the Government could compel submission of the information without undue difficulty. Pet. App. 53a n.26.

This is not to say that the voluntary character of the submission was deemed completely irrelevant. Under the *National Parks* test, it was well established that if the

Government had no ability to compel submission of necessary information, or if the process of compelling it would be overly burdensome, then the information would be exempt from disclosure. *See* Pet. App. 61a; *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991); *Timken Co. v. United States Customs Service*, 531 F. Supp. 194, 198 (D.D.C. 1981). In addition, courts applying *National Parks* concluded that, even if disclosure would not completely preclude the Government from obtaining necessary information in the future, when disclosure would seriously diminish the quality or completeness of the information, that information could be exempt. *See* Pet. App. 53a-57a, 85a; *Washington Post Co. v. HHS*, 690 F.2d 252, 268-69 (D.C. Cir. 1982); *Indian Law Resource Center*, *supra*, at 148.

Under *National Parks*, therefore, the courts focused on whether disclosure would cause an identifiable harm to the Government's information-gathering abilities. This unitary but fact-sensitive inquiry under the "impairment" prong of *National Parks* has worked well in practice, yet the D.C. Circuit has chosen to replace it with a new test that will assuredly be a ground for frequent litigation by both requesters and submitters. This significant departure from prior case law, and the problems that the new test will create, warrant this Court's review.

2. *The Incentive for Agencies To Evade the FOIA by Accepting Information Voluntarily.* The decision below should also be reviewed because it will lead to results that are fundamentally inconsistent with this Court's often-repeated admonitions that "'[t]he mandate of the FOIA calls for broad disclosure of Government records,'" and that "FOIA exemptions are to be narrowly construed." *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted); *accord Department of Air Force v. Rose*, 425 U.S. 352, 360-62 (1976). Far from ensuring broad access to agency records, the Court of Appeals' new rule

encourages agencies to act in conflict with the objectives of the FOIA by enabling them to withhold important records about the regulation of public health and safety under a claim that the information was submitted "voluntarily." Agencies may be tempted to undermine the effectiveness of the FOIA by agreeing to accept information on a "voluntary" basis, even when they could, and would, compel disclosure of the same information if necessary. The decision below effectively permits agencies to contract for exemptions from the FOIA.[5]

The question is not whether agencies and submitters would "conspire" to keep information from the public, as the Court of Appeals suggested, Pet. App. 19a. No such nefarious purpose need be attributed to the agencies. Rather, a realistic understanding of human nature compels the recognition that no agency has any incentive to open its files to the public and subject itself to scrutiny and possible criticism or embarrassment. This common-sense insight was fundamental to Congress' decision to enact the FOIA. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Congress' overarching objective was to limit agency discretion to withhold records, not expand it, as the Court of Appeals has done. Thus, Congress substituted legislative judgment for administrative discretion by confining the agencies' authority to withhold records to

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[5] This danger is not speculative, but is borne out in the record and the history of the NRC. In 1980-81, the NRC considered instituting a greatly expanded mandatory reporting system that would have required licensees to file reports about component failures at their plants. *See* 46 Fed. Reg. 3541 (1981); 45 Fed. Reg. 6793 (1980). The NRC dropped plans for such a system when INPO volunteered to manage a similar system privately and assured the NRC that it would have access to the system. *See* 46 Fed. Reg. 49,134 (1981). Although the public would have been able to obtain any reports that the NRC required to be submitted, it cannot see the identical data on the INPO-operated system, because the information on the INPO system is submitted voluntarily.

narrow and clearly delineated statutory exemptions. *See Rose*, 425 U.S. at 360-61.[6]

The decision below also threatens to reduce the quality of information about Government regulation that remains available to the public, because it encourages regulated entities to provide Government agencies with only minimal data that will be made public, while submitting far more significant information in secret. This case, in fact, illustrates that very danger. As mentioned *supra*, p. 4, the NRC uses the SEE-IN reports to verify the completeness and accuracy of the descriptions of safety-related "events" at nuclear power plants in the publicly disclosed LERs, which licensees are required to submit to the NRC. But if licensees realize that they can tell the NRC the "real story" about events at their plants in the secret SEE-IN reports, their public LERs will inevitably become more and more sketchy, revealing less to the public about the important issue of safety at nuclear power plants. Under the Court of Appeals' new test, agencies' regulatory decisions will be based increasingly on secret information rather than public information, and citizens will have a diminished understanding of agency actions. Thus, the Court of Appeals' decision creates a mechanism by which agencies can insulate their decision-making from public monitoring and accountability.

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[6] To reinforce this point, Congress amended Exemption 3 in 1976 to overrule this Court's conclusion in *Administrator, FAA v. Robertson*, 422 U.S. 255, 266 (1975), that the FOIA did not supersede earlier statutes affording agencies "a broad degree of discretion on what information is to be [withheld]." Congress overruled *Robertson* because it was perceived as giving agencies "*cart[e] blanche* to withhold any information [they please]." H.R. Rep. No. 880, pt. I, 94th Cong., 2d Sess. 23 (1976). The thrust of the FOIA as a whole, including revised Exemption 3, "is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive Branch." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 & n.34 (D.C. Cir. 1978).

In this regard, the importance of the decision below can hardly be overstated. Government agencies may have evidence that firms have distributed unsafe medical devices to the public, *see Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); *Teich*, *supra*, participated in illegal boycotts, *see Green v. Department of Commerce*, 468 F. Supp. 691 (D.D.C. 1979), charged entertainment and lobbying expenses to the public under Government contracts, *see Common Cause v. Department of Air Force*, 1 GDS ¶ 80,162 (D.D.C. 1980), or engaged in price fixing, *cf. 9 to 5*, *supra*, at 13 (Breyer, J., dissenting). The Government's regulatory response to these matters is of the highest public interest, but without access to the factual basis for the Government's regulatory action or inaction, the public cannot reach an informed conclusion as to whether the Government has taken the proper course. Yet the decision below invites agencies to keep this material secret, by choosing to accept crucial information about public health and safety "voluntarily" and withhold it from the public. This *carte blanche* to the agencies, to close their files as they deem appropriate, is antithetical to the principles that led to the enactment of the FOIA and requires review by this Court.

3. *The Deviation From the Purpose of Exemption 4.* The decision below also warrants review because, in exempting safety-related data that is shared with an entire industry and has no bearing on any company's competitive position, it has adopted a construction entirely unrelated to the purpose of Exemption 4, *viz.*, the protection of competitively sensitive business information. At heart, Exemption 4 "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *National Parks*, 498 F.2d at 768. There is no suggestion, in either the text or the legislative history of the exemption, that Congress intended the word "confidential" to include a situation in which an industry

consortium distributes safety data to all participants in the industry, some of whom may be in potential competition with each other.

Part of the problem with the decision below is its expansion of Circuit precedent which, in turn, construed the statutory term "commercial" too broadly. *See* Pet. App. 19a, 47a; *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1290. The Court of Appeals read the term "commercial" to include information that does not relate to the sale, purchase, or exchange of goods or services, or to the financial or marketing position of a company. In combination with its overbroad interpretation of the word "confidential," the Court of Appeals has expanded the scope of the exemption far beyond Congress' design for protection of business secrets, to include information circulating widely through an entire industry, even to competitors. This Court should adopt a construction of Exemption 4 more consonant with Congress' objective, either by construing the word "commercial" narrowly, or by limiting the exemption as a whole to competitively sensitive information.

4. *The Reverse-FOIA Problem.* Finally, the Court of Appeals' decision warrants review because it has opened up the possibility that the Government might be *prohibited* from disclosing information that is submitted voluntarily, even if the Government concludes that disclosure of the information promotes the public interest, and even if the information is not competitively sensitive. This possibility could deal a devastating blow to the public's ability to monitor agency operations.

Although it has long been settled that submitters of information can maintain "reverse-FOIA" actions to prevent the disclosure of competitively sensitive information, *see Chrysler Corp. v. Brown*, *supra*, under *National Parks* the prevailing view was that submitters could not successfully prevent the disclosure of information that was

not competitively sensitive by arguing that the Government's access to the information would be impaired as a result of disclosure. As Judge Posner pointed out, the Government is always likely to "lend[] a sympathetic ear to claims that disclosing a document will make it harder to get information in the future," *General Electric Co.*, *supra*, at 1402; thus, when an agency concludes that disclosure will not prevent it from obtaining necessary information in the future, its conclusion can not be challenged under the "impairment" prong of *National Parks*.

But in the decision below, the Court of Appeals explicitly recognized "a *private interest* in preserving the confidentiality of information that is provided the Government on a voluntary basis." Pet. App. 17a (emphasis added). This suggests that, in the future, a submitter that voluntarily provides information to the Government may successfully prevent disclosure of the information in a reverse-FOIA action, even if the information is not competitively sensitive. If so, then the Court of Appeals has effected a revolution in the law, for until now it has been the universal understanding that agencies have wide discretion to release information that is not competitively sensitive. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1155-56 (D.C. Cir. 1987); *National Org. for Women v. Social Security Admin.*, 736 F.2d 727, 745 (D.C. Cir. 1984); *General Electric Co.*, *supra*.

From at least one recent case, it appears that this is precisely the effect of the decision below. In *McDonnell Douglas Corp. v. Rice*, *supra*, a District Court enjoined the Air Force from disclosing the option price paid to a military contractor for equipment. Because the military contractors had entered into the contracting process voluntarily, the District Court reasoned that the option price was also submitted "voluntarily." Transcript of Motions Hearing at 35. Accordingly, the District Court concluded that the option price was exempt from

disclosure under the Court of Appeals' new construction of Exemption 4 and that the contractor could prevent disclosure of the price by the Government.

The District Court arrived at this conclusion notwithstanding the federal Government's long-standing practice, codified in regulations and heretofore ratified by the lower courts, of releasing the maximum possible information about Government contracts to the public, in recognition of the important public interest in monitoring Government contracting procedures. *See* 48 C.F.R. 5.401(b), 14.408-1, 205.303 (disclosure of contract information); *see also Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988) (unsuccessful reverse-FOIA suits). Indeed, the District Court in *McDonnell Douglas* observed that the probable effect of the Court of Appeals' new test is to render invalid many of the Government's regulations that encourage disclosure of information about Government contracting. Transcript of Motions Hearing at 38. This decision demonstrates the far-reaching and deleterious effects of the decision below on the public's ability to hold agencies accountable for their actions.

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For eighteen years, the *National Parks* test governed all commercial and financial information submitted to the Government by outside persons. Its universal adoption by other courts and its incorporation by Congress into other statutes demonstrate that the test has worked tolerably well. The Court of Appeals mistakenly believed that it was simplifying matters by confining the reach of *National Parks*, but in fact it has greatly complicated the law of the FOIA, and it has left agencies, requesters, and submitters with a test that is much more complicated and difficult to apply. Moreover, the Court of Appeals significantly

reduced the amount of vital information about public health and safety available to the public, and it may even have prohibited agencies from disclosing important information when they conclude that the public interest warrants such disclosure. Because of the significance of the decision below for the administration of the FOIA, and for public access to information generally, the writ of *certiorari* should be granted.

CONCLUSION

The writ of *certiorari* should be granted.

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